Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RAMON LOPEZ, GUILLERMO JAVIER MEJIA, AND JORGE ORTEGA,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. During A Criminal Jury Trial, May The Judge Refuse To Supplementally Instruct The Jury On The Law Of Entrapment, Where The Jury, Itself, Requests Such An Instruction During Deliberations And Where The Defense Did Not Originally Make A Request For Such An Instruction At The Time That The Jury Received Its Initial Jury Instructions?

2. Are The Lower Federal Appellate Courts Misconstruing The Speedy Trial Act, 18 U.S.C. § 3161(h)(1), To Permit A Trial Court To Exclude The Days Following The Granting Of A Motion For More Time To File Pretrial Motions, Especially Where, Thereafter, No Substantive Motions Are Ever Filed?

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Ramon Lopez, Guillermo Mejia and Jorge Ortega, jointly petition this Court to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is published at 82 F.3d 1032. That opinion is reproduced in the appendix to this petition.

BASIS FOR JURISDICTION

The opinion of the lower appellate court was filed on May 14, 1996.

This Court has jurisdiction to review a decision of a United States Court of Appeals pursuant to 28 United States Code Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .

Title 18 United States Code Section 3161(h) provides:

> (h) The following periods of delay shall be excluded . . . in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –
>
> * * * *
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;. . . .

STATEMENT OF THE CASE

1. The Facts Concerning The Crime.

The three petitioners, Ramon Lopez, Guillermo Mejia and Jorge Ortega, were indicted for and ultimately convicted of two drug crimes, namely possession of cocaine with intent to distribute it and conspiracy to commit that crime in violation of 21 United States Code Sections 841(a)(1)-(2) and 846.

The evidence introduced by the Government against the defendants, taken in a light most favorable to the verdict, was the following.

Jose Benitez, a foreign national, was hired by the Government for the purpose of smuggling cocaine into the United States to apprehend its distributors in Miami,

Florida. A Special Agent of the Customs Service told Mr. Benitez to take a job aboard an ocean-going vessel, the Marudi, to travel to Colombia, and to attempt to catch on with drug smugglers, who would attempt to import cocaine into the United States on board that vessel. Mr. Benitez did obtain a job as a crew member. Mr. Benitez traveled to the Country of Colombia, unsupervised by any federal agents while there.

Mr. Benitez testified that he met a person, whom he had known from before this trip. That person connected him to another person, who requested Mr. Benitez to smuggle seven kilos of cocaine to the United States. At that time and while still in Colombia, Mr. Benitez was introduced to an individual named "Miguel." Mr. Benitez subsequently identified "Miguel" as co-defendant Mejia. Mr. Benitez was instructed on how to deliver the cocaine, once he arrived with it in the United States. Ultimately, five kilos were to be delivered to one person and two kilos to another person.

Upon arrival in Miami, Mr. Benitez contacted Special Agent Grimal. Agent Grimal and other agents came to the vessel Marudi for an inspection. At that time and unknown to anyone else, Mr. Benitez informed the Customs officers where the seven kilos of cocaine were hidden. Those agents took custody of that cocaine.

Unbeknownst to the federal agents, Manuel Alameda had been repeatedly contacting defendant Lopez for a couple of weeks to request Mr. Lopez to help him obtain cocaine. Defendant Lopez stated that he could not do so. One day, defendant Lopez stated that Mr. Alameda could obtain the cocaine Alameda wanted.

Mr. Benitez met with defendant Lopez and co-defendant Mejia at a local hotel. Mejia told Benitez that Lopez was the person to whom Benitez was to deliver five of the kilos of cocaine. Federal agents observed this meeting, although they could not hear what was discussed among that group of men. Later, Mr. Benitez called the beeper number that Lopez gave him and had a conversation with a person, whose voice Mr. Benitez later identified as that of defendant Lopez. This telephone conversation was recorded. Although there was no mention of the word "cocaine," the conversation concerned setting up a meeting at which five kilos of cocaine were to be delivered later that day at a restaurant.

Agents of the Customs Service provided Mr. Benitez with a car. The five kilos of cocaine, which had previously been seized by the federal law enforcement officers, were placed in the trunk.

Mr. Benitez was fitted with a recorder. Agents surveilled the restaurant at a distance from which they were unable to independently hear the conversations being conducted inside the restaurant. Defendant Lopez arrived at the restaurant. Co-defendant Jorge Ortega appeared. Subsequently, Mr. Alameda entered the restaurant carrying a bag, which contained a large amount of money. Alameda gave the bag to Mr. Lopez, who gave that bag to Mr. Benitez. All of this money was given to Mr. Benitez as payment for his transportation of that cocaine into the United States. Mr. Benitez left the restaurant with Mr. Ortega and that money. Both Benitez and Ortega entered the car, which contained the cocaine.

After Benitez and Ortega drove off, defendant Lopez and Mr. Alameda were arrested. Mr. Benitez and co-defendant Ortega were followed to a trailer park at which was a trailer that Mr. Ortega owned. After Mr. Ortega exited the car, he was arrested. The cocaine and the money were seized. The amount of money was approximately $22,000.00.

Mr. Mejia never appeared at the restaurant and, consequently, was never a participant in the delivery of the cocaine. Mr. Mejia was arrested two days later.

Mr. Ortega never appeared at the hotel. The federal agents had neither seen nor heard of Mr. Ortega before his appearance at the restaurant.

The jury deliberated for a total of eight hours over two days before returning guilty verdicts on both counts against all three petitioners.

2. The Request For A Supplemental Jury Instruction.

During the trial, the jury learned that the Government had hired a foreign national named Benitez, and instructed him to obtain cocaine for the purpose of smuggling it into the United States to thereafter apprehend those to whom he delivered this cocaine. In addition to prior payments in two other unrelated cases, Benitez was paid $30,000.00 for this case alone – an amount Benitez admitted was a small fortune in this Country of El Salvador. Mr. Benitez was paid based on the cases he helped initiate. Defendant Lopez' name never came up when Mr. Benitez obtained the cocaine in the Country of Colombia that he ultimately smuggled into the United States. Mr.

Lopez unexpectedly surfaced for the first time on the very day of the crime at the meeting that occurred at the hotel. Benitez was not a federal law enforcement officer. It is clear from this record that the Government could not and did not know all that Benitez did or may have done, when federal agents were not with him.

The jury also heard that Mr. Alameda called Mr. Lopez repeatedly over a two-week period to try to get Mr. Lopez to obtain cocaine for him until Lopez finally called to state that some cocaine was available for Alameda to purchase if he so desired.

Initially, no defendant requested a jury instruction on the law pertaining to entrapment.

After almost two hours of deliberating, the jury sent a note to the trial judge. This note stated:

> There are members of this jury who believe that the U.S. Government used methods or ways to conspire. These members feel that a crime was created by the U.S. Government to make an arrest on the unknowing and unknown suspected drug traffickers.
>
> We need some clarification as to how we can proceed.

At an in-chambers discussion held without a court reporter, defense counsel requested that the trial judge respond to this jury note by giving a jury instruction on the law of entrapment. The Government requested the judge to instruct the jury that the government's actions were not for their consideration and that the jury should decide what the defendants did based on the evidence. Defense counsel requested that the judge instruct the jury

that it could consider the Government's actions in determining whether there was a crime.

The trial judge denied the defense and Government requests. Instead, the trial judge drafted the following written response to the jury note and sent it to the jury:

> You may consider all of the evidence in the case in determining whether the Government has proved guilt beyond a reasonable doubt. However, you must also follow my instructions on the law in determining whether the Government has met its burden.

Defense counsel objected to that limited response. The prosecution argued that, although neither entrapment nor government misconduct were at issue for this jury, nevertheless some clarifying instruction was warranted regarding the fact that the Government's conduct was not an issue. The trial judge offered to take up the matter on the next day of trial after the weekend recess.

On Monday, the trial judge again considered this matter. The prosecutor submitted a written proposed supplemental jury instruction stating in pertinent part that "the conduct of the United States Government is not an issue for [the jury] to consider." Again, the prosecution unsuccessfully urged the trial judge to respond to the jury beyond the response that this judge had already given.

REASONS FOR GRANTING THE PETITION

1. A Jury's Request For A Supplemental Jury Instruction Must Be Answered In A Manner That Preserves The Right To Have The Jury Make The Determination Of Innocence Or Guilt.

After two hours of deliberations, the jury sent a note to the trial judge. Although stated in layman's terms, it is clear that the jury was asking the trial judge to instruct it on the law of entrapment.

The defense requested the trial judge to respond on the law of entrapment. The prosecution urged the distinction between the law of entrapment and the issue of whether the Government engaged in outrageous conduct violative of a defendant's constitutional right to due process of law. Both sides were correct on their position on the law. The defense of entrapment is generally one for the jury, rather than for the trial court. *Mathews v. United States*, 485 U.S. 58 at 63 (1988).

In this case, the jury, itself, made a request that the trial judge instruct it on the law with which the jury, itself, was concerned and which the jury, itself, had a right to decide. When a jury, itself, makes explicit its difficulties and requests a supplemental instruction on the law from the trial judge, that judge has a duty to adequately respond and to clarify the jury's concern with concrete accuracy. A conviction ought not to rest on an equivocal direction to the jury on a basic issue. *Bollenbach v. United States*, 326 U.S. 607 at 612-613 (1946).

The factual circumstances of this case implicate the Sixth Amendment right of a criminal defendant to a trial

by a jury. Here, the trial judge rejected the requests of both sides to accurately respond on the law about which the jury inquired. The ultimate resolution of the jury's question was for the jury to resolve under the appropriate law. The defense did not argue that the jury should ignore the law and did not argue that the jury should be inaccurately informed of the pertinent law. Rather, the defense merely argued that the jury should be told what the law was. By totally failing to respond, the trial judge in essence directed a verdict on the matter. That is impermissible.

The essence of the constitutional right to a jury trial is the concept that a jury reach the requisite finding of guilt. It is for that reason that a judge may not direct a verdict for the prosecution, no matter how overwhelming the evidence. *Sullivan v. Louisiana,* 508 U.S. 275 (1993).

Most recently, this Court has held that a criminal trial is violative of the Constitution, where a trial judge refused to submit a jury issue to the jury for the jury's decision. In *United States v. Gaudin,* ___ U.S. ___, 115 S.Ct. 2310 (1995), this Court held that the right to have a jury make the ultimate determination of guilt has an impressive pedigree. This Court noted that the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.

This case warrants review. Here, the lower court ignored the Sixth Amendment issue presented to it. There is a material difference between a defendant's waiver of the right to seek a jury instruction on the issue of guilt and the jury's decision on its own to be advised on the

law in an area of concern to it. That distinction was lost on the lower appellate court. More importantly, by disregarding *Gaudin*, the lower appellate court improperly converted this matter into the realm of judicial discretion. The need to give supplemental jury instructions is common enough to make this case worthy of review.

2. The Lower Federal Courts Are Misconstruing The Speedy Trial Act To Permit Exclusion Of Time Following The Granting Of A Motion For Further Time To File Pretrial Motions Pursuant To Title 18, United States Code section 3161(h)(1).

The petitioners asserted that their indictment should have been dismissed for a violation of the Speedy Trial Act, Title 18 United States Code Section 3161 *et seq.* There is no dispute that the 70-day speedy trial clock began to run on June 20, 1990. Opening statements to the jury were heard on September 24, 1991. When denying a motion to dismiss the indictment for violation of the Speedy Trial Act, the trial judge conceded that this was a close case.

At both the trial level and before the lower appellate court, the parties joined issue on the excludability of several periods of time. Given this Court's request for brevity in a petition for a writ of certiorari, there is no need to recount the precise issues of litigation on includable time. Here, the lower court obviated the need for this Court to resolve those other Speedy Trial Act issues.[1] The

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[1] Should this Court grant review on the main issue presented for review and then reverse the lower appellate court's ruling, this matter should be remanded for further consideration of those other issues.

lower court held that one of the three petitioners filed several pretrial motions. One of those motions was a motion for more time to file additional pretrial motions. The trial court granted that motion and gave that petitioner until fifteen days before trial to file any motion that he desired. Concededly, no additional motions were filed by that petitioner.

The lower appellate court held that the granting of this motion permitted the exclusion of approximately ten months, the time between the granting of this motion and the filing of the motion to dismiss for a violation of the Speedy Trial Act. That ruling was based on lower appellate court precedent that the granting of time for the preparation of pretrial motions is an excludable period of time pursuant to Title 18 United States Code Section 3161(h)(1). *E.g. United States v. Montoya,* 827 F.2d 143 at 153 (7th Cir. 1987). The application of that principle of law to the facts of this case is absurd and serves to eviscerate the intent of Congress to protect a criminal defendant's right to a speedy trial.

Start with this simple proposition. The time for preparation for trial is not excludable. Obviously, all time prior to trial is attributable to trial preparation. Any reasoning that all trial preparation time was excludable would be specious, because such reasoning would swallow the entire speedy trial rule and make meaningless Congress' express limitations within the Speedy Trial Act. Congress has recognized that some cases are such as to likely require a continuance to permit adequate pretrial preparation. However, that situation is limited to the granting of a continuance, not the mere fact that more preparation time is needed. Title 18 United States Code

Section 3161(h)(8)(B)(ii) provides that a continuance can be granted, and time excluded accordingly, "if the case is so unusual or so complex, . . . , that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section." In a non-complex case, a continuance can be granted pursuant to Title 18 United States Code Section 3161(h)(8)(B)(iv), if the failure to grant a continuance would deny defense counsel the reasonable time necessary for effective preparation, taking into account the exercise of reasonable diligence. The clear implication from this wording of this statute is the proposition that Congress intended to include pretrial preparation in the usual case within the 70-day period. Restated, one must conclude that the 70-day period of time provided by Congress is for pretrial preparation.

If the above reasoning is true, how can the time needed to prepare pretrial motions be excludable? Would not the time to prepare pretrial motions be a part of pretrial preparation and, therefore, in the run of the mill case, a part of the includable 70-day period? Moreover, until a substantive motion is filed, there is nothing for the trial court to do and nothing to delay the trial.

If a motion is filed, Congress expressly permits exclusion of the time period from the filing of the motion through the conclusion of any hearing on that motion or until any other prompt disposition of that motion. 18 U.S.C. § 3161(h)(1)(F). Congress has placed a thirty-day limit on court consideration of a motion after a hearing. 18 U.S.C. § 3161(h)(1)(J). Based on the statutory structure, all time consumed in placing the trial court in a position to dispose of a pending substantive motion is excludable.

Henderson v. United States, 476 U.S. 321 (1986). Given those express provisions regarding motions, *after* they are filed, it strains credibility that Congress' silence regarding the preparation time for the filing of a motion, would permit that preparation time, itself, to be excludable.

The only rational construction of this statutory scheme is the following. When a defendant files a motion to permit more time to file pretrial motions, the time between the filing of that particular motion and the disposition of that motion is excludable. Thereafter, if a motion of any kind is filed, the time between the filing of that specific motion and its disposition is excludable. However, the time between the order granting the motion-to-file-further-motions and the filing of the resulting substantive motion, itself – if a motion is ever filed – is not excludable.

A trial judge can grant a continuance in the manner provided for by the Speedy Trial Act, based on the need to file pretrial motions. However, the mere granting of a motion for additional time to file pretrial motions is not excludable time.

The birth of the legal principle employed by the lower appellate court occurred in the decision *United States v. Jodoin*, 672 F.2d 232 (1st Cir. 1982), which was written by now-Justice Breyer. *Jodoin* held that the time for preparation of a motion to suppress, following the granting of a motion for additional time to file that motion to suppress, is excludable time under the Speedy Trial Act. This holding was accomplished without any inquiry into legislative history.

Two other circuits, the Seventh and Tenth, adopted the holding of *Jodoin* and attempted to provide some legal reasoning of substance to support the end result. *United States v. Tibboel*, 753 F.2d 608 at 710 (7th Cir. 1985); *United States v. Thomas*, 877 F.2d 1250 at 1256 (7th Cir. 1986); *United States v. Montoya*, 827 F.2d 143 at 153 (7th Cir. 1987); *United States v. Mobile Materials, Inc.*, 871 F.2d 902 at 913-914 (10th Cir. 1989). Three other circuits, the District of Colombia, Ninth and Eleventh, adopt this principle without attempting to provide legal reasoning. *United States v. Wilson*, 835 F.2d 1440 at 1444-1445 (D.C. Cir. 1987); *United States v. Lewis*, 980 F.2d 555 at 564 (9th Cir. 1992); *United States v. Mejia*, 82 F.3d 1032 at 1035-1036 (11th Cir. 1996).

Subsequent to the *Jodoin* decision, this Court left no doubt that this matter must be resolved as one of statutory construction, employing legislative history in those situations where the plain language of the Speedy Trial Act does not resolve the matter. *See United States v. Rojas-Contreras*, 474 U.S. 231 (1985); *Henderson v. United States*, 476 U.S. 321 (1986). What is so amazing is the fact that *Jodoin* made no effort to explore legislative history and the fact that those above-cited decisions that did look at legislative history admitted that this legislative history was contrary to the holding of those cases that exclusion is permissible under Title 18 United States Code section 3161(h)(1). *See United States v. Tibboel, supra* at 610; *United States v. Mobile Materials, Inc., supra* at 914; *see also United States v. Hoslett*, 998 F.2d 648 at 654-657 (9th Cir. 1993).

The holding of the Sixth Circuit in *United States v. Moran*, 998 F.2d 1368 at 1370-1371 (6th Cir. 1993) conflicts with the holding in *Jodoin* and its progeny. In effect, the

decision of the Third Circuit in *United States v. Fields*, 39 F.3d 439 (3d Cir. 1994) also conflicts with those other circuits. It is submitted that *Fields* provides the proper analysis, reasoning that the time for preparation of pretrial motions is only excludable time if the trial court grants a continuance for that purpose in accordance with the other statutory requirements for the granting of a continuance.[2] *Fields'* reasoning accords with the plain language of the statute.

This Court should eliminate the conflict of decisions on this important Speedy Trial Act issue.

CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] Two continuances were granted in this case. The petitioners argued below that these orders could not lead to excludable time, because they did not comply with the statutory requirement that reasons be set forth. The lower appellate court avoided ruling on this argument, based on its holding that the order granting an extension of time for the preparation of pretrial motions permitted exclusion of ten months.

APPENDIX

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Opinion Of The Lower Appellate Court.....App. 1

UNITED STATES of America,
Plaintiff-Appellee,
v.
Guillermo Javier MEJIA, a/k/a Miguel;
Jorge Ortega, Ramon Lopez,
Defendants-Appellants.

No. 91-6108.

United States Court of Appeals,
Eleventh Circuit.

May 14, 1996.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 90-389-CR-EBD, Edward B. Davis, J., of possession with intent to distribute cocaine and conspiracy, and they appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) grant of one defendant's motion to extend time to file motions tolled Speedy Trial Act clock as to all codefendants; (2) government's alleged failure to disclose information regarding confidential informant did not violate *Brady*; (3) trial court acted within its discretion in refusing to give entrapment instruction; (4) one defendant's actions of changing plea to guilty and then testifying against codefendants did not require mistrial; and (5) jury was entitled to disbelieve one defendant's testimony that he was not knowingly involved in drug transaction, and could draw opposite inference.

Affirmed.

Yolanda Morales, Coral Gables, FL, for Jorge Ortega.

Arthur Joel Berger, Miami, FL, for Guillermo Javier Mejia and Ramon Lopez.

Kendall Coffey, U.S. Attorney, Madeleine Shirley, Adalberto Jordan, Linda Collins Hertz, Asst. U.S. Attys., Miami, FL, for appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and ENGEL*, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Guillermo Mejia, Jorge Ortega and Ramon Lopez appeal drug convictions. We affirm.

Jose Benitez, a confidential informant working under the supervision of Special Agent Paul Grimal, was placed on a boat going from Miami to Columbia, South America. Benitez was to gather intelligence on the Columbian drug trade and (if contacted by cocaine traffickers) to arrange to bring cocaine into the United States so that the distributors could be arrested. When Benitez's boat arrived at an island off the coast of Columbia, Benitez was notified that "Cesar" wanted him to smuggle some cocaine to the United States.

Benitez was taken to Cesar's home, where he met with Cesar, appellant Mejia, and a drug dealing Columbian policeman. Benitez and Mejia discussed the logistics of delivering the cocaine to Miami; they also agreed to meet at a bar near the Miami River docks once the drugs were successfully smuggled into the United States. After this conversation, Benitez returned to the boat; and the

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* Honorable Albert J. Engel, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

policeman later delivered to him over 5 kilos of cocaine. The boat, Benitez, and the cocaine then made the return voyage to Miami.

A day after the boat docked in Miami, Benitez arrived at a local hotel for a pre-arranged meeting with Agent Grimal. Before finding Grimal, however, Benitez coincidentally ran into Mejia. As the two talked, appellant Lopez arrived. Mejia told Benitez that Benitez should deliver the cocaine to Lopez. Lopez and Benitez then discussed where the delivery should take place. Agent Grimal, at the hotel to meet with Benitez, observed all of this conduct.

Later, a rendezvous was set up at a restaurant. Benitez, wearing a hidden eavesdropping device provided by Agent Grimal, arrived at the restaurant and was met by Lopez. At the restaurant already was appellant Ortega, who had not met Benitez before. Codefendant Alameda arrived next. After going into the restaurant, Alameda returned to his car and picked up a transparent bag filled with cash. He then returned to the restaurant with the cash bag. Lopez instructed Ortega to go with Benitez to retrieve the cocaine; Ortega and Benitez left in Benitez's car. Lopez also left the restaurant and followed Benitez.

Ortega directed Benitez to their destination (a trailer park). During the trip, Ortega explained to Benitez that the cash had not been wrapped properly and told Benitez that "when you have something on you, you have to be very careful." Upon arrival at the trailer park, Ortega got out of the car; and Benitez handed him a briefcase containing drugs. Unknown to Defendants, drug agents had

been observing this activity; agents arrested Ortega, Lopez, Alameda and, eventually, Mejia.

All four defendants were to be tried together. But, after opening statements, Alameda changed his plea to guilty and later testified for the government. Two defendants testified on their own behalf and offered innocent explanations for their misdeeds. Still, all were convicted of possession with intent to distribute cocaine and of conspiracy to do the same. On a variety of grounds, each appeals his convictions. We affirm.

I.

Each appellant argues that his statutory right to a speedy trial was violated. *See* 18 U.S.C. § 3161. The parties present many arguments on whether the Speedy Trial Act was violated. The district court concluded there was no violation of the Act; and, we may affirm on any ground that finds support in the record. *Jaffke v. Dunham*, 352 U.S. 280, 280, 77 S.Ct. 307, 308, 1 L.Ed.2d 314 (1957). In general, the burden is on the defendant to prove that a dismissal is appropriate. 18 U.S.C. § 3162(a)(2).

To have been timely, this trial must have started within 70 days of 20 June 1990, the day after the return of the relevant indictment. *See* 18 U.S.C. § 3161(c)(1); *see also, United States v. Vasser*, 916 F.2d 624, 626 (11th Cir.1990). But, days which are excludable under the Act are not counted against the 70 day limit. *See* 18 U.S.C. § 3161(h). And, in a multi-defendant case, time excluded due to one defendant results in excludable days for his codefendants. *See United States v. Sarro*, 742 F.2d 1286, 1299 (11th Cir.1984).

On 19 July 1990, Ortega filed nine pre-trial motions.[1] One of these motions was a request for an extension of time for filing further motions. By an order filed on 21 August 1990, the court gave Ortega until fifteen days before trial to prepare and to file pretrial motions. Under these circumstances, courts have concluded that the time given for filing potential pretrial motions is excluded under 18 U.S.C. § 3161(h)(1) because the time given is "delay resulting from other proceedings concerning the defendant." *See United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir.1985); *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 913-914 (10th Cir.1989); *United States v. Wilson*, 835 F.2d 1440, 1444-45 (D.C.Cir.1987); *United States v. Lewis*, 980 F.2d 555, 564 (9th Cir.1992); *United States v. Jodoin*, 672 F.2d 232, 237-38 (1st Cir.1982).[2] Whether motions are actually filed during the extension is unimportant. *United States v. Montoya*, 827 F.2d 143, 153 (7th Cir.1986).[3]

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[1] Time from the filing of a pretrial motion until the prompt disposition of that motion is excluded under 18 U.S.C. § 3161(h)(1)(F).

[2] One difference between this case and these cited cases is that here the district judge granted an extension of time which ended 15 days before trial; the extension was not for a specific number of days. Where a defendant does not request a certain number of days and where no defendant objects to the kind of indefinite extension granted here, we think the difference – the difference between a definite and indefinite extension – commands no different result.

[3] Because answering the question is not required in this case, we decide nothing today about whether extensions for the preparation and filing of pretrial motions granted by the court upon motion of the government or by the court *sua sponte* result in excludable days under § 3161(h)(1). *Compare United States v.*

In this case, excluding the days between the filing of the motion for extension of time and the day which was 15 days before trial eliminates the possibility that the Speedy Trial Act was violated. (About 10 months passed between the order granting the extension and the 1 July 1991 motion to dismiss under the Speedy Trial Act.)[4] Where a defendant moves for an extension, he can perhaps limit the number of excludable days by limiting his request for extra time to a definite period. *See, e.g., Montoya,* 827 F.2d at 153. Or, the defendant can choose to ask for no extension. And, a defendant can object to an open-ended extension. But here no appellant contends that he objected to the open-ended extension granted at the request of Ortega.

In sum, under the circumstances, an order granting an extension of time for the preparing and the filing of pre-trial motions causes a delay for the purpose of the Speedy Trial Act: a delay resulting from a proceeding concerning the defendant. As such, the days between the

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Montoya, 827 F.2d 143, 153 (7th Cir.1986) (where court *sua sponte* grants extension, time is excludable) *with United States v. Moran,* 998 F.2d 1368, 1370-71 (6th Cir.1993) (where court *sua sponte* grants extension, days are not excluded); *see also, United States v. Hoslett,* 998 F.2d 648, 660 (9th Cir.1993) (Kozinski, J. dissenting) (explaining why extensions granted by court order – whether upon motion of defendant, motion of government or *sua sponte* – should result in excludable days).

[4] The Sixth Amendment's fundamental independent protection against undue delay is not controlled by this interpretation of the Speedy Trial Act. Although a constitutional argument was asserted in the district court, this argument has been abandoned on appeal because it is not raised in appellants' briefs.

order granting Ortega's motion for an extension and the day which was 15 days before trial are excluded under section 3161(h)(1). The Speedy Trial Act was not violated here.

II.

Appellants argue that they were denied a fair trial by the government's failure to disclose before trial all inducements offered Benitez in exchange for his cooperation. *See generally Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The district court's conclusion that no *Brady* violation occurred is subject to *de novo* review. *See United States v. Beasley*, 72 F.3d 1518, 1525 (11th Cir.1996).

Defendants were informed that Benitez received $30,000 for his cooperation in this case. But, defendants say the government did not disclose that Benitez was permitted to take more than $10,000 out of the country without filing the required paperwork, was given free lodging during the course of the investigation, and failed to pay taxes on money given to him for his cooperation. And, the government did not disclose Benitez had previously been paid $16,000 for his work on other cases.

Accepting that the government suppressed the evidence and that the evidence is probative of Benitez's truthfulness, we conclude no reasonable probability exists that the outcome of this trial would have been different had the extra information been disclosed. *See Delap v. Dugger*, 890 F.2d 285, 298-99 (11th Cir.1989)

(observing that a "reasonable probability" is one sufficient to undermine confidence in outcome). The government disclosed that Benitez was paid $30,000 for his work; the other information is cumulative. And, the information alleged to have been withheld was brought out in fact on cross examination of Benitez.[5]

III.

Appellants argue the district court abused its discretion in refusing to give a jury instruction on entrapment. During deliberations, the jury sent a note to the judge indicating that some jurors believed "a crime was created, by the U.S. Government." The judge then refused a defense request for an entrapment instruction; instead, the court sent a note telling the jury to consider all the evidence in determining whether the Government proved guilt beyond a reasonable doubt and to follow his instructions on the law in determining whether the Government met its burden.

Appellants contend that failing to give the requested instruction "in essence directed a verdict." But, no defendant requested an instruction on entrapment before the note from the jury was sent to the judge. That "the extent and character of additional instructions is within the sound discretion of the trial court" is well settled. *United*

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[5] Our review of the record persuades us that each item of evidence now said to have been withheld in violation of *Brady* was revealed to the jury through cross examination of Benitez. Mejia appears to concede this fact, writing in his brief, "[i]t is no answer that the benefits given to Benitez by the government were ultimately revealed."

States v. Parr, 716 F.2d 796, 808 (11th Cir.1983). It is also settled that the judge may sometimes simply refer the jury back to his earlier instructions. United *States v. Bailey*, 830 F.2d 156, 157 (11th Cir.1987). Given this record, the judge's response to the jury's question was no abuse of discretion.[6]

IV.

Next, Appellants argue the district judge abused his discretion in failing to grant a mistrial based on Alameda's change in plea and later testimony. Alameda's lawyer gave an opening statement where he protested his client's innocence and maintained that, while Alameda may have been present at a crime, he had no guilty knowledge. Counsel for Alameda's co-defendants offered similar theories in their openings.

But, before the introduction of evidence, Alameda – outside the presence of the jury – changed his plea in Count I to guilty. (He also pled guilty to charges in an unrelated matter.) The prosecution then announced it

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[6] Before a defendant is entitled to an instruction on entrapment, he must first raise a jury issue about whether the government created a substantial risk that the offense had been committed by one not disposed to do so. *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir.1985).

Here, the theory of defense was never entrapment; instead, Defendants argued no drug offense was committed. We conclude insufficient evidence was presented which would create a jury question on entrapment. *See id.* (listing evidence which might create jury question and holding defendant failed to produce such evidence). As such, the judge adequately responded to the jury's note.

planned to call Alameda as a witness. This incident inspired Alameda's codefendants – again outside the presence of the jury – to move for a mistrial.

The trial judge denied the motion. When the jury returned, the judge reminded them that they had "not heard one shred of evidence" yet. The judge then told the jury that he had decided to remove Alameda from consideration. The government later called Alameda to testify; the defense again moved (this time at sidebar) for a mistrial. The motion was denied. After Alameda's testimony, the trial court instructed the jury that Alameda's opening statement was not evidence and should be disregarded. The judge further instructed the jury that because of the guilty plea, the jury should consider Alameda's testimony "with more caution." The judge also instructed the jury that Alameda's plea should be considered only for Alameda's credibility and should not be considered in determining the guilt of other defendants.

A mistrial is not required where a codefendant changes his plea in the middle of a trial if the jury is properly instructed and if evidence of the plea is properly limited. *See United States v. Griffin*, 778 F.2d 707, 710 n. 5 (11th Cir.1985) (dictum). And, where a codefendant pleads guilty and later testifies, evidence of the guilty plea may be introduced to aid the jury in assessing the codefendant's credibility. *See id.* But, Defendants argue a mistrial is required where their codefendant offered a theory of defense identical to their own in opening statements, changed his plea, and then testified about his guilty plea and about his former codefendant's culpability.

Permitting testimony under these kind of circumstances might in some cases result in unfair prejudice. But under similar facts, other circuits have permitted a codefendant's testimony. *See United States v. Gambino*, 926 F.2d 1355, 1364 (3d Cir.1991); *and United States v. Pierro*, 32 F.3d 611, 616-618 (1st Cir.1994) And, as discussed above, the district court in this case carefully instructed the jury. Chiefly because of these instructions, we conclude there was no abuse of discretion here when the motions for mistrial were denied.[7]

V.

Ortega argues insufficient evidence exists to convict him. His contention is that the evidence proves his mere presence at a crime. *See, e.g., United States v. Hardy*, 895 F.2d 1331, 1335 (11th Cir.1990). Ortega was present at the restaurant where the delivery of drugs was discussed. He was instructed to (and did) go with Benitez to deliver the cocaine. He discussed the packaging of the money, telling

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[7] Defendant Ortega asserts another reason why Alameda's testimony requires a mistrial. Alameda testified that he knew Ortega from "past dealings." Ortega objected; the judge quickly struck this response and asked the jury to disregard it. But, Ortega asserts it was prosecutorial misconduct to elicit it. Alameda did not say that the "past dealings" were drug related (though the record is full of reference to "drug deals"). A matter withdrawn from the jury with a direction by the court that it be disregarded is no basis for reversal unless the matter was so highly prejudicial that it was incurable by the instruction. *See United States v. Adams*, 799 F.2d 665, 671 (11th Cir.1986). The instruction was enough. Alameda's utterance on "past dealings" is no grounds for a new trial.

Benitez that you have to be careful when you have something on you. And, he was holding cocaine when he was arrested.

Ortega took the stand in his own defense and offered innocent explanations for his conduct: he said he thought he was participating in a transaction to purchase a trailer, not a transaction to purchase cocaine. As explained recently in *United States v. Brown*, 53 F.3d 312, 314-15 (11th Cir.1995), a defendant's explanations at trial can actually increase the amount of evidence supporting a guilty verdict. *Id.*; *see also United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir.1991). One reason we accept that a jury can treat a defendant's testimony – even if all the words deny wrongdoing – as proof of guilt is that the jury is uniquely able to evaluate the defendant's demeanor on the witness stand. *Brown*, 53 F.3d at 315; *see also Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 2492, 120 L.Ed.2d 225 (1992) (plurality opinion) (jury may disbelieve testimony based on demeanor and is "entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt").

In this case, the guilty verdict is contrary to Ortega's testimony.[8] Thus, we are forced to accept that the jury rejected the heart of Ortega's testimony. A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true. *See Brown*, 53 F.3d at 314. Because this inference is permissible and because it

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[8] Ortega was asked, "at any time were you aware that there was a cocaine deal going on?" and "did you ever conspire with any other people to commit a cocaine transaction?" He answered "no" to both questions.

is an inference which supports the verdict, we must conclude that, from Ortega's denials of guilty knowledge, the jury had before it evidence that Ortega knew full well he was involved in a drug transaction. Sufficient evidence existed for a reasonable juror to have found guilt beyond reasonable doubt.

The convictions in this case are AFFIRMED.